

REBECCA CARDENAS, O/B/O )  
DAWN MENDOZA (DECEASED), )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
MICHAEL J. ASTRUE, Commissioner )  
of Social Security, )  
 )  
Defendant. )  
 )  
 )  
 )

No. CV-09-016-CI

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT  
AND REMANDING TO THE  
COMMISSIONER FOR ADDITIONAL  
PROCEEDINGS

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 19, 22.) Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and **REMANDS** the case to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

On March 22, 2004, Dawn Mendoza(Plaintiff) protectively filed for disability insurance benefits (DIB). (Tr. 106.) Plaintiff alleged disability due to missing fingers on her left hand, three missing toes on her right foot, pain in her left arm and shoulder,

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND  
REMANDING TO THE COMMISSIONER FOR ADDITIONAL PROCEEDINGS - 1

1 "depression/bipolar, severe highs and lows, pain and anxiety," with  
2 an alleged onset date of January 7, 2004. (Tr. 90, 106, 277.)  
3 Benefits were denied initially and on reconsideration. Plaintiff  
4 then requested a hearing before an administrative law judge (ALJ),  
5 which was held before ALJ Peter Baum on October 17, 2006. (Tr. 376-  
6 98.) Plaintiff, who was represented by counsel, testified. The ALJ  
7 denied benefits on February 14, 2007. (Tr. 13-19.) The Appeals  
8 Council denied review. (Tr. 4-6.) The instant matter is before  
9 this court pursuant to 42 U.S.C. § 405(g).

10 **STATEMENT OF THE CASE**

11 The facts of the case are set forth in detail in the transcript  
12 of proceedings and are briefly summarized here. At the time of the  
13 hearing, Plaintiff was 42 years old and had a ninth grade education.  
14 (Tr. 381.) She was divorced and living lived with two of her  
15 children, ages 14 and 5. (Tr. 389.) Plaintiff had work experience  
16 as a caregiver, bingo worker and customer service representative.  
17 (Tr. 71.) She had back surgery in 2004 for a herniated disc. (Tr.  
18 154.) She later suffered a back injury during her work as a care  
19 giver in 2005, and was found unable to work until February 2006,  
20 when she was released to sedentary level work by her treating  
21 physician. (Tr. 301, 361.) She was released to light duty work in  
22 or around May 2006. (Tr. 294-95.) She testified she was unable to  
23 hold a job due to back and pain issues. (Tr. 169, 393.) She  
24 testified she had burning and numbness down her legs as well as  
25 bowel and bladder incontinence. (Tr. 393.) She testified she also  
26 had problems with anger control and getting along with people at the  
27 workplace. (Tr. 394.) Plaintiff had a history of substance abuse.

1 (Tr. 156-57, 362.)

2 **ADMINISTRATIVE DECISION**

3 At step one, ALJ Baum found Plaintiff had not engaged in  
4 substantial gainful activity since the alleged onset date. (Tr.  
5 15.) At step two, he found Plaintiff had the severe impairments of  
6 "alcohol abuse, depressive and cognitive and personality disorders,  
7 status post surgical amputation of 3 fingers of the left hand and 3  
8 toes of the right foot secondary to chicken pox; lumbar disc  
9 desiccation; status post laminectomy and diskectomy." (Tr. 15-16.)

10 At step three, he determined Plaintiff's impairments, including  
11 substance abuse disorder met the criteria of 20 C.F.R. Part 404,  
12 Subpart P, Appendix 1 (Listings), Section 12.09(B)(*Substance*  
13 *Addiction Disorders: Depressive Syndrome*), and she was therefore  
14 "disabled" with the effects of substance abuse. (*Id.*) He then  
15 found that substance abuse was a contributing factor to Plaintiff's  
16 disability; however, if she stopped the substance abuse, she would  
17 "continue to have a severe impairment or combination of impairments"  
18 but they would not meet or equal the Listings. (*Id.*) Specifically,  
19 he concluded when Plaintiff was not abusing alcohol, she had  
20 "moderate restrictions in daily living activities, moderate  
21 difficulties in maintaining social functioning, moderate  
22 difficulties in maintaining concentration, persistence or pace, and  
23 no episodes of decompensation." (*Id.*)

24 At step four, the ALJ determined Plaintiff's statements  
25 regarding the intensity of her symptoms were not entirely credible  
26 and found she had the residual functional capacity (RFC) to lift and  
27 carry 20 pounds, sit, stand and walk six hours each in an eight-hour  
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1 workday with the following non-exertional restrictions: occasional  
2 bending, climbing, squatting and kneeling; and "moderate social and  
3 concentration limitations that do not preclude a full range of light  
4 work." (Tr. 17.) He found that even without substance abuse,  
5 Plaintiff could not perform her past relevant work. (Tr. 18.) At  
6 step five, relying on the Medical-Vocational Guidelines, 20 C.F.R.  
7 Part 404, Subpart P, Appendix 2, (Grids), he concluded there were  
8 other jobs in the national economy she could perform if she stopped  
9 the substance abuse. (Tr. 18.) He determined Plaintiff was not  
10 disabled as defined by the Social Security Act at any time through  
11 the date of his decision. (Tr. 19.)

#### 12 STANDARD OF REVIEW

13 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
14 court set out the standard of review:

15 A district court's order upholding the Commissioner's  
16 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
17 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
18 Commissioner may be reversed only if it is not supported  
19 by substantial evidence or if it is based on legal error.  
20 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
21 Substantial evidence is defined as being more than a mere  
22 scintilla, but less than a preponderance. *Id.* at 1098.  
23 Put another way, substantial evidence is such relevant  
24 evidence as a reasonable mind might accept as adequate to  
25 support a conclusion. *Richardson v. Perales*, 402 U.S.  
26 389, 401 (1971). If the evidence is susceptible to more  
27 than one rational interpretation, the court may not  
28 substitute its judgment for that of the Commissioner.  
*Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner*, 169  
F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility,  
resolving conflicts in medical testimony, and resolving  
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
Cir. 1995). The ALJ's determinations of law are reviewed  
*de novo*, although deference is owed to a reasonable  
construction of the applicable statutes. *McNatt v. Apfel*,  
201 F.3d 1084, 1087 (9th Cir. 2000).

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**SEQUENTIAL PROCESS**

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in

1 weighing the evidence and making the decision. *Browner v. Secretary*  
2 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
3 there is substantial evidence to support the administrative  
4 findings, or if there is conflicting evidence that will support a  
5 finding of either disability or non-disability, the finding of the  
6 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
7 1230 (9<sup>th</sup> Cir. 1987).

### 8 ISSUES

9 The question is whether the ALJ's decision is supported by  
10 substantial evidence and free of legal error. Plaintiff argues the  
11 ALJ erred when he: (1) improperly rejected the opinions of her  
12 treating physician; (2) improperly rejected the opinions of her  
13 daughter and physical therapist; and (3) erroneously relied on the  
14 Grids at step five. (Ct. Rec. 20 at 13.) Defendant responds the  
15 ALJ's decision should be affirmed. (Ct. Rec. 23.)

### 16 DISCUSSION

#### 17 A. Evaluation of Medical Evidence - Mental Impairments

18 The Contract with America Advancement Act of 1996 (CAAA)  
19 amended the Social Security Act, providing that "an individual shall  
20 not be considered to be disabled . . . if alcoholism or drug  
21 addiction would . . . be a contributing factor material to the  
22 Commissioner's determination that the individual is disabled." 42  
23 U.S.C. 423(d)(2)(C). Special statutes and regulations govern  
24 disability claims that involve substance abuse.

25 Under the regulations implemented by the Commissioner, the ALJ  
26 must follow a specific analysis that incorporates the five-step  
27 sequential evaluation process. 20 C.F.R. §§ 404.1535(a),  
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1 416.935(a). The ALJ first must conduct the five-step inquiry  
2 without attempting to determine the impact of substance addiction.  
3 If the ALJ finds that the claimant is not disabled under the five-  
4 step inquiry, the claimant is not entitled to benefits, and there is  
5 no need to proceed with further analysis. *Id.* If the ALJ finds the  
6 claimant disabled, and there is evidence of substance addiction,  
7 the ALJ should proceed under the sequential evaluation and §§  
8 404.1535 or 416.935 to determine if the claimant would still be  
9 disabled absent the substance addiction. *Bustamante v. Massanari*,  
10 262 F.3d 949, 955 (9<sup>th</sup> Cir. 2001). If found disabled with the  
11 effects of substance addiction, it is the claimant's burden to prove  
12 substance addiction is not a contributing factor material to her  
13 disability. *Parra v. Astrue*, 481 F.3d 742, 748 (9<sup>th</sup> Cir. 2007).

14 Here, in the first sequential evaluation, ALJ Baum found  
15 Plaintiff had severe "alcohol abuse, depressive and cognitive and  
16 personality disorders," and these mental impairments were  
17 "inextricably intertwined with her alcohol abuse." (Tr. 16.) He  
18 concluded Plaintiff's impairments met the criteria of Listing  
19 section 12.09(B) (*Substance Addiction Disorders: Depressive Syndrome*)  
20 when she was using drugs and/or alcohol. (*Id.*) Thus, because  
21 substance abuse was a contributing factor material to his  
22 determination, Plaintiff was found ineligible for disability  
23 benefits. (*Id.*) In making this determination, the ALJ stated he  
24 gave significant weight to the opinions of examining psychologist  
25 Jay Toews, Ed.D., who evaluated Plaintiff in December 2006. (Tr. 16,  
26 361-69.)

27 At step two of the second sequential evaluation, the ALJ found  
28 that if Plaintiff stopped the substance abuse, she would still have

1 a severe impairment or combination of impairments, although he did  
2 not identify specifically which severe mental impairments existed  
3 without the effects of substance abuse. (Tr. 16.) Nonetheless, he  
4 concluded these unidentified mental impairments caused moderate  
5 social and concentration limitations in Plaintiff's ability to work.  
6 (Tr. 16-17.) Plaintiff argues the ALJ erred when he failed to  
7 reject or include the limitations assessed by Dr. Toews "without  
8 substance abuse," in the final RFC determination.

9 As an examining psychologist, Dr. Toews' uncontradicted  
10 opinions may be rejected only with "clear and convincing" reasons.  
11 *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). If contradicted,  
12 the reasons must be "specific" and "legitimate." *Andrews*, 53 F.3d at  
13 1043. Historically, the courts have recognized conflicting medical  
14 evidence, the absence of regular medical treatment during the  
15 alleged period of disability, and the lack of medical support for  
16 doctors' reports based substantially on a claimant's subjective  
17 complaints of pain as specific, legitimate reasons for disregarding  
18 the treating physician's opinion. *Flaten v. Secretary of Health &*  
19 *Human Servs.*, 44 F.3d 1453, 1463-64 (9<sup>th</sup> Cir. 1995); *Fair v. Bowen*,  
20 885 F.2d 597, 604 (9<sup>th</sup> Cir. 1989). The ALJ need not discuss all  
21 evidence presented, but must explain why significant probative  
22 evidence has been rejected. *Vincent v. Heckler*, 739 F.2d 1393,  
23 1394-95 (9<sup>th</sup> Cir. 1984).

24 The record shows that Dr. Toews diagnosed a depressive disorder  
25 NOS (severe), a cognitive disorder NOS, borderline intellectual  
26 functioning, probable, and a learning disorder NOS (by history).  
27 (Tr. 366.) He observed Plaintiff was marginally compliant in her  
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1 testing and exhibited poor effort in testing. (Tr. 366.)  
2 Recognizing that Plaintiff was actively abusing alcohol, Dr. Toews  
3 distinguished between limitations with the effects of substance  
4 abuse, and without the effects of substance abuse in his Medical  
5 Source Statement prepared for the Social Security Administration,  
6 (SSA) and noted that "alcohol abuse exacerbates personality  
7 problems, psychosocial adjustment, depression." (Tr. 368.)

8 Dr. Toews opined that without substance abuse, Plaintiff  
9 exhibited moderate limitations in her ability to understand,  
10 remember and carry out short, simple instructions, and make judgment  
11 on simple work-related instructions. Dr. Toews also assessed a  
12 "marked" limitation in her ability to interact appropriately with  
13 the public, and moderate limitations in her ability to interact  
14 appropriately with supervisors, co-workers and respond appropriately  
15 to work pressures and changes in the routine work setting. (Tr. 367-  
16 38.)

17 Dr. Toews' opinions are not contradicted. His diagnoses are  
18 consistent with those of Roland Dougherty, Ph.D., who evaluated  
19 Plaintiff for the SSA in December 2004. (Tr. 154-64.) Dr.  
20 Dougherty did not diagnose alcohol/drug addiction. (Tr. 159.) He  
21 opined Plaintiff had poor social interaction and "difficulty  
22 sustaining concentration and persisting at tasks." (Tr. 160.) The  
23 record also includes a psychiatric review technique form, completed  
24 by agency psychologist Dr. James Bailey. (Tr. 134-53.) Dr. Bailey  
25 did not include a substance addiction disorder (12.09) among the  
26 psychological disorders supported by the record. (Tr. 140.)  
27 Consistent with Dr. Toews, Dr. Bailey noted a marked limitation in  
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1 Plaintiff's ability to interact with the public. (Tr. 138.) These  
2 two acceptable medical sources, therefore, agreed that Plaintiff had  
3 a marked non-exertional limitation without the effects of substance  
4 abuse, as well as several moderate limitations that would affect her  
5 ability to work.

6 The ALJ erred when he failed to give specific "clear and  
7 convincing" reasons supported by the record for rejecting the  
8 specific moderate and marked limitations assessed by Dr. Toews and  
9 Dr. Bailey. He further erred when he failed to explain the weight  
10 given these probative opinions at all steps of the sequential  
11 evaluation. 20 C.F.R. § 404.1520a(e)(2). These legal errors are  
12 cause for reversal. *Smolen v. Chater*, 80 F.3d 1273, 1292 (9<sup>th</sup> Cir.  
13 1996). On remand, the ALJ will identify in his decision the  
14 specific severe mental impairments that would continue if Plaintiff  
15 stopped the substance abuse, discuss the medical evidence that  
16 supports his step two (without substance abuse) determination, and  
17 give legally sufficient reasons for disregarding acceptable medical  
18 source opinions during the entire sequential evaluation process.<sup>1</sup>  
19 SSR 96-8p.

20 **B. Step Five - Use of the Grids**

21 If it is determined at step four that a claimant cannot perform  
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23 <sup>1</sup> Plaintiff also argues the ALJ erroneously evaluated evidence  
24 from Plaintiff's daughter and physical therapist. (Ct. Rec. 20 at  
25 19-20.) On remand, the ALJ will re-evaluate lay witness evidence  
26 regarding how Plaintiff's impairments affect her ability to perform  
27 work related tasks, as instructed in the Commissioner's policy  
28 ruling, SSR 06-03p.

1 past work, the ALJ continues to step five. 20 C.F.R. §§  
2 40.1520(a)(4)(iv),(v). At step five, the burden shifts to the  
3 Commissioner to consider the claimant's RFC, age, education and work  
4 experience, and show the claimant can perform other work in the  
5 national economy. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir.  
6 1984).

7 The medical-vocational guidelines (Grids) were adopted by the  
8 SSA to improve the efficiency and uniformity of Social Security  
9 benefits proceedings at step five, when the Commissioner is obliged  
10 to prove there are other suitable jobs available. *Desrosiers v.*  
11 *Secretary of Health and Human Services*, 846 F.2d 573, 577 (9<sup>th</sup> Cir.  
12 1988). Pursuant to rulemaking authority granted by Congress, the  
13 SSA developed a matrix of four factors (physical ability, age,  
14 education and work experience) that could be used by the  
15 Commissioner to determine whether work exists that a claimant can  
16 perform. This established a consistent procedure at step five for  
17 identifying other jobs that did not rely on vocational expert  
18 testimony. "Where a claimant's qualifications correspond to the job  
19 requirements identified by the rule, the guidelines direct a [step  
20 five] conclusion as to whether work exists that the claimant could  
21 perform." *See Heckler v. Campbell*, 461 U.S. 458, 461-62 (1983)(use  
22 of Grids upheld as valid).

23 The use of the Grids is appropriate only where "a claimant's  
24 functional limitations fall into a standardized pattern accurately  
25 and completely described by the Grids." *Tackett*, 180 F.3d at 1103  
26 (citing *Desrosiers*, 846 F.2d at 577). "Significant non-exertional  
27 impairments make reliance on the Grids inappropriate." *Desrosiers*,

1 846 F.2d at 577. Non-exertional limitations are those that do not  
2 depend on an individual's physical strength, such as mental,  
3 sensory, manipulative and environmental limitations. *Cooper v.*  
4 *Sullivan*, 880 F.2d 1152, 1155 (9<sup>th</sup> Cir. 1989). Where non-exertional  
5 limitations exist, "the ALJ must examine independently the  
6 additional adverse consequences resulting from the nonexertionary  
7 impairment." *Id.*, 880 F.2d at 1156. The Grids are then used as a  
8 "framework," because, alone, the Grids do not fully describe the  
9 claimant's abilities and limitations. *Tackett*, 180 F.3d at 1102.  
10 Further, a vocational expert is required where "a claimant's non-  
11 exertional limitations are in themselves enough to limit his range  
12 of work." *Polny v. Bowen*, 864 F.2d 661, 663-64 (9<sup>th</sup> Cir. 1988).

13 Here, the ALJ erred when he failed to consider the significant  
14 psychological limitations identified by Drs. Toews and Bailey,  
15 resulting from Plaintiff's diagnosed mental disorders without  
16 substance addiction. The unrejected "marked" limitation (without  
17 substance abuse) in Plaintiff's ability to interact appropriately  
18 with the public assessed by Drs. Toews and Bailey do not support the  
19 ALJ's step-five finding that Plaintiff's non-exertional limitations  
20 would have "little or no effect on the occupational base of  
21 unskilled light work."<sup>2</sup> (Tr. 19.) Without evidence from a

22 \_\_\_\_\_  
23 <sup>2</sup> The ALJ's step five reliance on the Grids is also  
24 inappropriate considering Plaintiff's postural, manipulative and  
25 environmental limitations resulting from her missing digits and  
26 diagnosed back impairments. (Tr. 132-35.) Several functional  
27 limitations were assessed by agency physician Howard Platter, M.D.,  
28 whose opinion evidence was given "significant weight" by the ALJ,

1 vocational expert, this finding is not supported by substantial  
2 evidence. See *Polny*, 864 F.2d at 663-64. In addition, the evidence  
3 of a significant non-exertional limitation caused by a severe mental  
4 impairment makes the ALJ's application of the Grids inappropriate.  
5 (*Id.*) Thus, the Commissioner did not meet his burden at step five  
6 to show there are a significant number of jobs in the national  
7 economy Plaintiff is able to perform. Because vocational expert  
8 testimony is needed to resolve the step five issue, remand for  
9 additional proceedings is appropriate. *Harman*, 211 F.3d at 1178;  
10 *Smolen*, 80 F.3d at 1292. Accordingly,

11 **IT IS ORDERED:**

12 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 19**) is  
13 **GRANTED**, and the matter is remanded to the Commissioner for  
14 additional proceedings pursuant to 42 U.S.C. § 405(g) and the  
15 decision above, including testimony by a vocational expert if step  
16 five is reached;

17 \_\_\_\_\_  
18 but not fully discussed or incorporated in the RFC determination.  
19 (Tr. 18.) Further, in his policy ruling, the Commissioner advises  
20 that manual dexterity narrows light range of work, and explains:

21 As a general rule, limitations of fine manual dexterity  
22 have greater adjudicative significance - in terms of  
23 relative number of jobs in which the function is required  
24 - as the person's exertional RFC decreases. . . . The  
varying degrees of loss which can occur may require a  
decisionmaker to have the assistance of a [vocational  
specialist].

25 SSR 85-15. Without further evidence from a vocational expert, the  
26 ALJ's finding that Plaintiff's missing fingers would have little or  
27 no effect on her occupational base, (Tr. 19), is not supported by  
28 substantial evidence.

1       2. Defendant's Motion for Summary Judgment (**Ct. Rec. 22**) is  
2 **DENIED.**

3       3. An application for attorney fees may be made by separate  
4 motion.

5       The District Court Executive is directed to file this Order and  
6 provide a copy to counsel for Plaintiff and Defendant. Judgment  
7 shall be entered for **Plaintiff** and the file shall be **CLOSED.**

8       DATED October 29, 2009.

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10                               S/ CYNTHIA IMBROGNO  
                                  UNITED STATES MAGISTRATE JUDGE